IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.144 OF 2006

Parvatibai Ishwar Naikwadi ...Petitioner
vs.
Udhav Vasant Bhosale ...Respondent

Ms Manjiri Parasnis i/b Mr.G.S.Godbole for the Petitioner
Mr.Anilkumar Patil for the Respondent.

CORAM: A.S.OKA,J.
DATE OF HEARING THE LAST ARGUMENTS: JUNE 20,2007
DATE OF PRONOUNCEMENT OF THE JUDGMENT:JULY 20,2007

JUDGMENT:

1. I have heard the submissions of the learned Counsel for the parties. The petitioner is the original Plaintiff and the Respondent is the original defendant. The Petitioner filed a suit for specific performance of an agreement for sale dated 24th December 1997. As the Respondent did not appear in the suit, the trial court passed an exparte decree in favour of the Petitioner directing the Respondent to pay a sum of of Rs.70,000/- with interest at the rate of 18% p.a.

2. The Respondent filed an Application under Rule 13 of Order IX of the Code of Civil Procedure, 1908 for setting aside the exparte decree. There was delay of 3 months and 12 days in filing the said application. Therefore, an application for condonation of delay was made by the Respondent which was numbered as Misc. Application No.14 of 2006. By the Judgment and Order dated 13th July 2006, the learned Trial Judge allowed the application for condonation of delay subject to payment of costs by the Respondent. By this Revision

Application under section 115 of the said Code, the Petitioner has taken an exception to the said order.

3. The learned Advocate for the Petitioner placed reliance on the decision of the learned Single Judge of this Court in case of Justine Francis Cardoz vs. Bhaskar Bhatt [1998 (1) Mah.L.R. 722). Placing reliance on the said decision, the learned Advocate for the Applicant submitted that as the application for setting aside the exparte decree was not filed during the stipulated period of limitation provided by Article 123 of the Limitation Act,1963 (hereinafter referred to the said Act of 1963), the said application was not maintainable. The learned Advocate for the Petitioner submitted that there was no power vesting in the trial court to condone the delay in making an application under Rule 13 of Order IX of the said Code. The learned Advocate for the Petitioner submitted that the impugned order is illegal and deserves to be quashed and set aside.

4. I have considered the submissions. In the case of Justine Francis Cardoz (supra) the revision Applicant before this court was the original Plaintiff-landlord. In a suit filed by him against the Respondent, an exparte decree was passed on 11th April 1996. An application for setting aside the exparte decree was filed on 22nd October 1996. The application for setting aside the exparte decree was allowed by the court of Small Causes and the said order was confirmed by the Appeal

Bench of the Court of Small Causes. The submission before this Court was that the period of limitation for making an application for setting aside the exparte decree was governed by Article 123 of the said Act of 1963 and there was no provision under the said Act of 1963 for condonation of delay in filing such Application. The learned Single Judge referred to the decisions of the Patna High Court and Rajasthan High Court. After referring to the certain Judgments of the Apex Court and this court, the learned Single Judge observed thus :

"9...According to me, these judgments cannot be applied to the facts of the present case. There is no ruling that under Article 123 of the Limitation Act the Court has power to condone delay in filing an application for setting aside exparte decree when the Respondent is duly served Writ of Summons and had taken part in the proceedings."

The view taken by the learned Single Judge is that there is no power vesting in the court to condone the delay in filing an application for setting aside the exparte decree.

5. Article 123 of the said Act of 1963 provides for period of limitation of 30 days to apply for setting aside the exparte decree. Period of 30 days is to be reckoned from the date of decree or where the summons or notice was not duly served, from the date on which applicant had knowledge of the decree. Article 123 is incorporated in part I of the third division of

the schedule which deals with various applications. The Section 5 of the Limitation Act reads thus :

"5. Extension of prescribed period in certain cases - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

. Explanation- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

6. It is obvious that section 5 of the said Act of 1963 will also apply to the application governed by Article 123 of the schedule to the said Act of 1963. Section 5 of the said Act of 1963 was not brought to the notice of the learned Single Judge when he decided the case of Justine (supra). In view of applicability of section 5 of the said Act of 1963, if an application for setting aside the exparte decree is not filed within a period provided under Article 123 of the said Act of 1963, there is a power vesting in the court by virtue of section 5 of the said Act of 1963 to condone the delay provided sufficient cause is made out. Thus, the decision of

the learned Single Judge does not consider the express statutory provision of section 5 of the said Act of 1963. As held by the Apex Court in the case of Municipal Corporation of Delhi Vs. Guram Kaur [(1989) 1 S.C.C. page 101), a decision should be treated as per incuriam when it is given in ignorance of the terms of a statute. It is, therefore, obvious that the decision of the learned Single Judge in the case of Justine (supra) cannot be read as a binding precedent. Thus, there is a power vesting in the court to condone the delay in filing an application for setting aside the exparte decree.

7. In the present case, the delay was of three months and twelve days. The ground made out by the Respondent is that on 9th January 2006 he was ill and therefore he could not remain present. According to the Respondent he is an illiterate person. According to the case of the Respondent, he became aware about the exparte decree on 21st April 2006 when he received a notice of the execution application. It is stated that the trial court was closed for summer vacation from 30th April 2006 to 4th June 2006 and therefore, application for obtaining certified copy of the decree was made on 5th June 2006. The certified copies were received by the Petitioner on 12th June 2006 and the application was filed on 13th June 2006. Considering the aforesaid aspects, the learned trial Judge held that the Respondent has made out a sufficient cause for condonation of delay. No case is made out for

interference with the view taken by the learned trial Judge.

8. Hence, Revision Application is rejected.

JUDGE